

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 5487 of 2013
(Arising out of SLP(C) No.13099 of 2008)

M/s. TVC Skyshop Ltd. ... Appellant

Versus

M/s. Reliance Communication and Infrastructure Ltd. ...Respondent

J U D G M E N T

G.S. SINGHVI, J.

1. Having failed to persuade the learned Single Judge and the Division Bench of the Bombay High Court to entertain its prayer for setting aside the decree passed in favour of the respondent under Order XXXVII Rule 3 of the Code of Civil Procedure, the appellant has filed this petition.

2. The appellant and respondent entered into an agreement whereby the respondent provided 54 mobile phone connections to the former in 2003. Due to non-payment of the amount due, the respondent sent legal notice dated 22.9.2004 and demanded Rs.13,31,800.59. After some time, the

respondent filed a petition under Sections 433 and 434 of the Companies Act, 1956, which came to be registered as Company Petition No.910/2005 for winding up of the appellant by alleging that it has failed to pay Rs.19,69,417.11 despite demand. The learned Company Judge passed order dated 13.4.2006 and directed the appellant to deposit a sum of Rs.11,00,000/- to avoid advertisement of the petition filed by the respondent.

3. The respondent also filed a Summary Suit No.1989/2006 under Order XXXVII for passing a decree of Rs.25,83,078.35 with interest at the rate of 30% per annum from the date of suit. The summon issued by the Court was duly served upon the appellant, but neither an application was filed for leave to defend nor any one appeared on the date specified in the summons. Therefore, the learned Single Judge passed order dated 7.11.2006 and decreed the suit in terms of clauses (a) and (b) of the plaint. 4. Soon

thereafter, the appellant filed application dated 18.12.2006 in the form of an affidavit of its Company Secretary Shri Mahesh Katudia and prayed for setting aside decree dated 7.11.2006. In paragraphs 5 and 6 of his affidavit, Shri Katudia referred to order dated 13.4.2006 passed by the learned Company Judge in Company Petition No.910/2005 and averred that a sum of Rs.11,00,000/- was deposited by the appellant on 8.6.2006. In paragraph 7, he averred that Shri Pradeep Bhandekar, who was working as Executive Assistant to the Chairman had resigned in September, 2006 and on that count, proper instructions could not be given to Shri R.A.Shaikh, Advocate.

It was also averred that summons for judgment was served on Shri R.A. Shaikh, Advocate in September, 2006 but no application for leave to defend was filed and that resulted in passing of *ex parte* decree dated 7.11.2006.

5. When the appellant's prayer for setting aside decree dated 7.11.2006 was taken up for consideration, counsel appearing on its behalf relied upon Order IX Rule 13 CPC. The learned Single Judge referred to the relevant provision and held that the two grounds contemplated by Rule 13 are not available for setting aside decree dated 7.11.2006. The learned Judge observed that it is not a case in which the summons had not been served upon the judgment debtor or that there was sufficient cause for its non-appearance on 7.11.2006.

6. The appellant appealed against the order of the learned Single Judge but could not convince the Division Bench of the High Court to entertain its prayer for setting aside decree dated 7.11.2006. Paragraphs 4 and 5 of the judgment of the Division Bench, which contain the reasons for dismissal of the appeal read as under:

" 4. The question of going into the infirmity or legality or illegality pertaining to the rate of interest or to what extent the amount has already been paid by the appellant would have arisen in case there was any material placed by the appellant in that regard before the learned Single Judge after obtaining necessary leave to defend the suit in accordance with the law. The appellate Court's going into the documentary evidence, if such evidence have been found on record before the trial Court and that too without following the procedure prescribed under Order 41 Rule 27 of the Code of Civil Procedure, does not arise at all. In any case, the appellant having failed to seek

leave to defend before the learned Single Judge in accordance with the law, the question of going into various contentions sought to be raised which essentially relate to the evidence does not arise, at this stage.

5. As regards the contention that the appellant has already paid a substantial amount, nothing would prevent the appellant from bringing such fact to the notice of the Executing Court in case the respondent files an execution application in accordance with the decree passed in its favour.”

7. We have heard learned counsel for the parties. Order XXXVII Rules 1 to 4 CPC, which have bearing on the decision of this appeal read as under:

“1. Courts and classes of suits to which the Order is to apply.

—(1) This Order shall apply to the following Courts, namely:—

- (a) High Courts, City Civil Courts and Courts of Small Causes; and
- (b) other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:—

- (a) suits upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

(iv) suit for recovery of receivables instituted by any assignee of a receivable.

2. Institution of summary suits.—(1) A suit, to which this Order applies, may if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,—

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:—

“(Under Order XXXVII of the Code of Civil Procedure, 1908)”

(2) The summons of the suit shall be in Form No.4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf, and such decree may be executed forthwith.

3. Procedure for the appearance of defendant.—(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

4. Power to set aside decree.—After decree the Court may, under special circumstances set aside the decree, and if

necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.”

8. An analysis of Order XXXVII shows that the provisions contained therein are applicable to the suits specified in Rule 1(2). Rule 2(1) prescribes the particulars to be incorporated in the suit. Sub-rule (3) of Rule 2 lays down that the defendant shall not defend the suit unless he enters appearance and in default of his appearance, the allegations contained in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for a sum not exceeding the sum specified in the summons together with interest at the specified rate, if any. Rule 3 contains the procedure for the appearance of the defendant. Sub-rule (5) prescribes time limit of ten days from the service of summons for judgment within which the defendant can apply for leave to defend. The concerned Court can grant leave to defend unconditionally or conditionally. First proviso to this sub-rule lays down that leave to defend cannot be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has substantial defence or that the defence is frivolous or vexatious. Second proviso to sub-rule (5) lays down that if the defendant admits part of the amount claimed by the plaintiff then he shall not be granted leave to defend unless the admitted amount is deposited in the Court. Sub-rule (6) provides for the consequences of the defendant's failure to apply for leave to defend or refusal of prayer for leave to defend. In such an eventuality,

the plaintiff is entitled to judgment forthwith. Sub-rule (7) lays down that if the defendant is able to show sufficient cause, the Court can excuse the delay in entering of appearance or in making an application for leave to defend. Rule 4 gives power to the Court to set aside the decree provided special circumstances exist for doing so. The Court can also stay or set aside execution and grant leave to the defendant to defend the suit.

9. The expression “special circumstances” appearing in Order XXXVII Rule 4 was considered by this Court in *Rajni Kumar v. Suresh Kumar Malhotra* (2003) 5 SCC 315 and it was observed:

“The expression “special circumstances” is not defined in the Civil Procedure Code nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37 Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz. to give leave to the defendant to appear to the summons and to defend the suit.”

In the same judgment, the Court considered the scope of order XXXVII Rule 4 and observed:

“It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend

the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the court considers it reasonable so to do, on such terms as the court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the court, all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to the defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.”

10. In the present case, we find that the application filed by the appellant for setting aside decree dated 7.11.2006 did not disclose any special circumstance which could justify an order under Order XXXVII Rule 4. In his affidavit, Shri Mahesh Katudia had merely stated that sum of Rs.11,00,000/- had been paid in terms of order dated 13.4.2006 passed by the learned Company Judge and proper instructions could not be given to the Advocate engaged for defending the suit. Therefore, it is not possible to find any fault with the view taken by the Division Bench of the High Court on the tenability of the appellant's prayer for setting aside decree dated 7.11.2006.

11. The argument of Shri Rohan Thawani, learned counsel for the appellant that even though the appellant had not applied for leave to defend, the learned Single Judge was duty bound to scrutinise the claim of the respondent and the suit could have been decreed only if the Court felt satisfied that the claim was bonafide and not vexatious which finds some support from the judgment in Neebha Kapoor v. Jayantilal Khandwala (2008) 3 SCC 770 sounds attractive in the first flash but we do not find any valid ground to overturn the impugned judgment because, as mentioned above, the affidavit filed by Shri Mahesh Katudia did not disclose any special circumstances which could warrant exercise of power under Order XXXVII Rule 4. He did not even contest the liability of the appellant to pay the amount claimed in the plaint. The mere fact that one of the officials of the appellant had resigned would not constitute a valid ground for negating the policy underlying Order XXXVII in general and Rule 3(5) in particular.

12. Equally meritless is the argument of Shri Thawani that the rate at which the respondent claimed interest is highly excessive. According to Shri Jaideep Gupta with whom we agree, the interest was charged as per the terms of the agreement and the appellant had always paid the bills in which interest was claimed at the rate of 30% per annum.

13. In the result, the appeal is dismissed.

.....J.
(G.S. SINGHVI)

.....J.
(V. GOPALA GOWDA)

New Delhi;
July 15, 2013.

SUPREME COURT OF INDIA



JUDGMENT